IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARRY L. SPARR, as Executor of the Estate of HOWARD E. SPARR, and BARRY L. SPARR, Individually, Plaintiff,	:	CIVIL ACTION
	:	NO. 02-2576
v.	:	
BERKS COUNTY, BERKS COUNTY COMMISSIONERS, BERKS COUNTY HOME - BERKS HEIM, ELIZABETH J. BRACKBILL, MD and HENRY N. BIALIS, MD, Defendants.	:	

MEMORANDUM

BUCKWALTER, J. July 18, 2002

The Plaintiff has filed a complaint alleging federal jurisdiction pursuant to sections 1331 and 1343 of Title 28. The specific Federal law Plaintiff refers to is the Nursing Home Reform Act of 1987 (NHRA), 42 C.F.R. 483.10 ff; 42 U.S.C. § 1395 -3 (a) to (h) and § 1396 r (a) to (h). The Plaintiff also makes the statement that this court has supplemental jurisdiction over any claim in this action arising under the laws of the Commonwealth of Pennsylvania pursuant to 28 U.S.C. § 1367.

The first and only claim for relief is that the "Bill of Resident Rights" which according to Plaintiff is required by Federal law and is "generated through the Federal Nursing Home Reform Act" was violated by Defendants. To sustain this claim, Plaintiff contends that

the NHRA permits a private cause of action. In the three briefs Plaintiff has filed to support his theory, a citation to the legislative history is the sole basis for it. That citation is:

> "The Committee emphasizes that the remedies specified under the Amendment are not exclusive, and should not be construed to limit the use of other remedies that may be available to either the States or the Secretary under State or Federal law. **Nor should the specified remedies be construed to limit remedies available to residents at common law, including private rights of action to enforce compliance with requirements for nursing facilities.**" H.R. Rep. No. 100-391 (I), Cong., 1st Sess. 453, 472. (Emphasis Added).

Even if the Bill of Resident Rights was violated in this case, which for purposes of the three motions to dismiss I must presume occurred, I can find nothing in Plaintiff's citation of legislative history which would persuade me to depart from the thorough analysis of Judge Lowell A. Reed, Jr. of this court in Chaflin v. Beverly Enterprises, Inc., 741 F. Supp. 1162 (E.D. Pa. 1989)[1], and that of Judge Harold L. Murphy in Brogdon v. National Healthcare Corporation, 103 F. Supp. 2d 1322 (N.D. Georgia 2000). The traditional test to determine whether a private right of action may be implied from a federal statute was applied by both Judges Reed and Murphy to the very statute in this case. That test set forth in Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975) requires the court to consider:

(1) Is the Plaintiff one of the class for whose special benefit the statute was enacted;

(2) Is there any indication explicit or implicit either to create or deny a private remedy;

(3) Is it consistent with the underlying scheme of the statute to imply such a remedy for the Plaintiff; and

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1. The so-called "Bill of Resident Rights" did not take effect until after Chaflin, but the analysis of private right of action under Title XIX of the Social Security Act, 42 U.S.C. § 1396 – 1396i is the same analysis applicable to the sections which plaintiff seeks to recover in this action.

(4) Is the cause of action one traditionally relegated to state law, in an area basically a concern of the state, so that it would be inappropriate to infer a cause of action based solely on Federal law.

Clearly, Plaintiff is one for whom the statute was enacted.

It is also clear that the statute does not explicitly permit a private cause of action.

As to an implied private cause of action, nothing in the legislative purpose or history suggests such a right exists. The statute is about disbursement of funds and the conditions a recipient of those funds must comply with. The section Plaintiff refers to in the legislative history actually supports a finding of no implied cause of action. The portion of Section 4114, Enforcement process, from which Plaintiff quotes, follows a lengthy discussion of the termination of a facility's continued participation in the program if such participation would constitute an immediate and serious threat to the health and safety of its patients. The section of legislative history quoted by plaintiff, read in context, emphasizes that while Congress has not authorized a private right of action under this statute, nothing in it limits private remedies available under common law.

There are no Third Circuit cases addressing this issue of implied right of private action with regard to this particular statute. The Fifth Circuit in two cases, Wheat v. Mass, 994 F.2d 273 (5th Cir. 1993) and Stewart v. Bernstein, 769 F.3d 1088 (5th Cir. 1985) has found no private right of action. Wheat with little discussion refers to Stewart, which directly answered in the negative the following question: "The threshold question is whether Congress intended to create a judicially enforceable cause of action between Medicaid residents and their private nursing homes." Stewart at p. 1092.

Thus, as already suggested, the second prong of the Cort v. Ash analysis must be answered in the negative.

Thirdly, it is arguably consistent with the overall scheme to imply a private right of action under the statute. This conclusion is based upon the reasoning that a private remedy is consistent with at least part of the statutory purpose which was to promote a suitable standard of care for nursing home patients. However, more compelling is Judge Reed's reasoning in Chaflin quoted as follows at 1167:

> I believe that the third Cort factor – whether implying a private remedy is consistent with the underlying purposes of the legislative scheme – mandates a finding that plaintiffs may not properly bring a private action for money damages under Title XIX. It is clear from the legislative history that, rather than focusing on the individual patient, the legislation is primarily directed at the role of participating *states* in providing medical care with the assistance of federal funds. The bill attempts to outline certain requirements which the *state* must comply with in order to become and remain eligible for federal funding. See S.Rep. No. 404, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Admin. News 1943, 2014. It is clear that "[t]he Medicaid program is not intended to meet all the medical needs of recipients. Rather, its goal is to provide medical assistance 'as far as practicable under the conditions of [each] State.'" Bumpus v. Clark, 681 F.2d 679, 684 (9th Cir. 1982) (quoting, in part, *117042 U.S.C. § 1396), *withdrawn as moot*, 702 F.2d 826 (9th Cir. 1983)). [FN6].

Finally, the fourth Cort v. Ash factor weighs in favor of a finding of a private right of action. Judge Murphy analyzed this factor at 1130 as follows:

> Nonetheless, the health and welfare of individuals is an area of legislation traditionally entrusted to the States. City of Boerne v. Flores, 521 U.S. 507, 534, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) (noting that States enjoy "traditional prerogatives and general authority to regulate for the health and welfare of their citizens"); Blue Cross & Blue Shield of Ala., Inc. v. Nielson, 116 F.3d 1406, 1413 (11th Cir. 1997) ("Adjustment of the rights and interests of insurers, health care providers, and insureds is a subject matter that falls squarely within the zone of traditional state

> regulatory concerns.") This consideration thus weighs against finding an implied cause of action.

Based upon the foregoing, the complaint in this matter will be dismissed in its entirety. An order follows.

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ORDER

AND NOW, this 18th day of July, 2002, upon consideration of:

(1) Motion to Dismiss of Defendant Berks County Home-Berks Heim (Docket No. 2);

(2) Motion to Dismiss or for a More Definite Statement of Defendant Brackbill (Docket No. 6); and

(3) Motion to Dismiss of Defendant Bialas (Docket No. 9);

it is hereby **ORDERED** that said Motions are **GRANTED**. Because there is no basis for federal jurisdiction, the court will not exercise supplemental jurisdiction if indeed there was any basis for it in the present complaint.

This case is **CLOSED**.

BY THE COURT:

RONALD L. BUCKWALTER, J.